

paragraph of this section, we still are not told what these deductions "allowable under this chapter" are. Finally, the list of such expenses-deductions, which can be limited, if there is not enough of the remainder of the "excess of the gross income", after all pre "certain expenses" deductions were processed - can be found only in Tr. Reg.1.280A-1,2. These regulations contain both: the List of Expenses, over which Sec.280A rules, and Order of their deduction, and this List contains only expenses which are associated with Homeownership. And while these Regulations are much longer and more detailed than Sec.280A, and include numerous examples of different business arrangements, BRPs., such as Pr.'s, are not only not present in these examples, as expenses, deduction of which can be limited, but are virtually nowhere mentioned all throughout these Tr. Reg. The business situations in all given examples in these regulations, are very telling by itself. Taxpayer A. owns a vacation home, taxpayer B. owns a boat, taxpayers C. and D. have shared equity in ownership of this or that, and so own, in the same manner.

**7. The unique importance of Tr. Reg. 1.280A-1,2,** is in shedding defining light on the purpose of Sec.280A, and in showing us that, expenses this section is suppose to rule over, - are typical Hmr.'s Exp. such as Home Insurance, Home Depreciation, and similar. And because such expenses do not belong to Ordinary and Necessary Bus. Exp., necessary for the income creating activity, it becomes clear, why title of Sec.280A calls them "certain expenses in connection with business use of home".

**8.** Thanks to Tr. Reg. 1.280A-1,2, we can make a conclusion that, Sec.280A was created to control deductions allowed to Hmrs. conducting business on the part of their homes, or in case of the Rental Use of them, as deductions for the mere fact of such usage; and the expression "Business Use of Home", in context of Sec.280A, simply emphasizes this fact; and expenses for the trade or business itself, are a separate category. It is truly important, at this juncture, to emphasize that, when we are speaking about Businessmen-Rrs., like Pr., and business part of their rental expenses, and about Businessmen-Hmrs. and their "certain expenses" for the "business use of home", - we are speaking about different categories of taxpayers, and different categories of expenses. The first - are Ordinary and Necessary Bus. Exp., which both, Rr. and Hmr., can incur in their trade or business; fully deductible under Sec.162 in the current business's year to both of these categories of taxpayers. And

the other, which only Hmrs. can have; are allowed by Legislature to be allocable to business activity, and thus - to become deductible to a certain limit only, because they are typical Hmr.'s payments in the equity of the owned home. Rr., in opposite to the Hmr., is not obliged to insure the home, in which he is a lodger, neither he has anything to do with home depreciation. It is true that, Utility is one common category that Hmr. and Rr. pay, but Rr. pays proportional business part of utilities for the need to sustain his business space work suitable; which payments belong to the part "rental and other payments", in Bus. Exp. definition of Sec.1v2. Hmr., on the other hand, would always be paying his full utility bills for his home. If Hmr., would use in his business some extra energy demanding machinery, and incur additional, business type expenses for that, he would be certainly entitled to deduct this additional energy cost, as an ordinary business expense.

9. When we will look now, at the text of subparagraph (ii) of paragraph 280A(c )(5), we will be able precisely decipher its somewhat confusing formulations, when we are told that, after we have deducted mortgage interest and similar from the excess of the gross income, we have to deduct from it - (*we quote*) "the deductions allocable to the trade or business in which such use occurs (but which are not allocable to such use) for such taxable year." If there is an art of none-intentional confusing the reader, than this is a perfect example, because this subparagraph (ii), (*in the absence of the definitive list of expenses-deductions, for which Sec.280A was created - in the section itself,*) - potentially can, and does create an impression in some minds, - that, it somehow limits deductions of Ordinary and Necessary Bus. Exp. also, and that thus Sec.280A possess such power, while, in fact, it hasn't any in this regard! Still:

a). The excess of gross income, which remains after all Ordinary and Necessary Bus. Exp. have been deducted, normally called - "net business income or loss", - is, what businessman taxpayer comes up with in the end of the tax year.

b). Tr. Reg. 1.280A-1,2 shows us this by example; and the possible reason, why it is does not give us example with business loss, is because in this case - all deductions for the business use of home, such as Home Insurance, Home Depreciation, etc. - the Hmr.'s deductions, are not deductible in such tax year; and these Regulations wouldn't be able to illustrate the specific, for Hmr.'s Exp., - order of their deductions; because, if such Hmr.'s Exp. "are

not allocable for such use" "for this business year", they must be rolled over toward the next year income under the same condition of deductibility; because such, allowed by the Congress allocability of these expenses-deductions to the trade or business, has not made them a part of Ordinary and Necessary Bus. Exp., and vice versa; and this is why their deductions are limited, which is emphasized in 280A(c )(5)(ii) by the expressions "(but which are not allocable to such use)" with following after that "for such taxable year." And mortgage interest and similar can be deducted by Hmr., as his regular itemized deductions. Tr. Reg. 1.280A-1,2 thus, is showing us how, and in which order, - deductions of "Certain Expenses", allowed to Hmr. under the Sec.280A, must be processed, because Sec.280A does not contain such information. And according this, let us suggest that, if subparagraph (ii) would be starting with expression: the deductions of "certain expenses in connection with" trade or business in which such use occurred, - this subparagraph would mean absolutely the same that it means in original text.

In regard to everything said previously, under this point **b).**, let us show by example, how R.'s Side treats subparagraph 280A(c )(5) (ii) in its attempt to prove that Sec.280A limits deductions of Ordinary and Necessary Bus. Exp. also.

On the Page - 12, of R.'s Side Brief to Court Of Appeals For The 9<sup>th</sup> Circuit, paragraph 280A(c )(5) is reduced to two subparagraphs only: (A) and (B) , and we quote:

"But even where a taxpayer comes within this exception, - (*means : exclusive usage of the part of dwelling unit as principal place for any type of business – Pr. 's insertion*) - the amount of the deduction may not exceed the excess of:

- (A) the gross income derived from such use for the taxable year, over. . .
- (B) . . . the deductions allocable to the trade or business in which such use occurs. . . for such taxable year."

As we can see, according to this completely reinvented paragraph (c )(5), and an apparent inclusion in the line (B), by R.'s Side, of Ordinary and Necessary Bus. Exp., - it looks, like such expenses have to be deducted from the gross income from the business twice. First, - to determine the excess of gross income, because there is no other way to define it; according 1985 Sec.280A Amendment, (*which will be demonstrated in Part "C"*); and second time, - to satisfy the erroneous interpretation of this paragraph that, deduction

of Ordinary and Necessary Bus. Exp. are indeed limited by Sec.280A. We have brought this example for the Court's attention, just to show once more that, R.'s Side application of Sec.280A to Ordinary and Necessary Bus. Exp. is truly paradoxical, because it contradicts the original Legislative formulation of paragraph 280A(c )(5) itself!

10. In addition to everything said over about Sec.280A, we truly doubt that, anyone in the Legal Practice would disagree that, any Law could be judged potent to rule over certain category or entity, only if, such category or entity is precisely and unambiguously presented and defined in this Law, as a Category or Entity, which falls under this Law regulations. And accordingly to this Universal Legal Standard, Pr.'s BRPs., just by the virtue of not being defined and specifically presented in Sec.280A and its Tr. Reg., as a Specific Category of Expenses over which Sec.280A rules, must be excluded from the scope of the Sec.280A ruling. And according to this, Pr. believes that we are allowed to say that, Sec.280A has Zero Legal Basis to rule over deductions of Pr.'s BRPs., and in fact, possibly over any Ordinary and Necessary Bus. Exp., because it does not contain their definition, specified as expenses that fall under Sec.280A disallowance ruling; and that these deductions - are ruled over - solely by Sec.162 and its Tr. Reg.

And this is why, Sec.280A contains only one cross-reference with Sec.162, (*which by the way demonstrates that authors of Sec.280A did consider possible legal interaction between these two sections*), but this one has nothing to do with specific Pr.'s deductions in this case, and with Ordinary and Bus. Exp., overall.

11. To the extent of previous paragraph, Pr. would also like to suggest that, judicial approach to governmental laws which have the widest national applications; and evaluation of their true authority, - can not be less strict than evaluation of, let say, Business Contracts. And treating such laws loosely, beyond stringent legal standards, can only lead to the anarchy and encourage abuse of power. And according to this, whatever is not included in the law, is simply not there; and such argument, as R.'s Side offered in its Brief to Court of Appeals (*page15, last paragraph*) that, the absence of particular references to Pr.'s BRPs. in Sec.280A, (*and in its Tr.Reg. – we must add*) does not preclude applying limitation to their deductions, should not be taken by the Courts lightly, or easily acceptable. And

to give this part additional and possibly undeniable weight, we will go now to Part C.

**Part C. - Legislative Committee Opinion in regard to Amendment of Sec.280A in the year 1985.** ( H.R. Rep. No. 99-426, at 134 35(1985), reprinted in, 1986 – 3 C.B. vol. 2 134 – 35.)

This Legislative Opinion, in this dispute, is probably the most important evidential and legal tool that clearly explains the specific purpose for which Sec.280A was created, and gives precise instructions on how it must be applied. It is what Legislature itself tells us: what we are allowed to deduct and how, and in which order. We present here the most important and decisive quotes from this Opinion; and we present them exactly as Tax Court has presented them in its Opinion, trying to use Committee's Opinion in support of Tax Court position, while in reality, it does absolutely different. Here is the first quote that we present:

**"Reasons for Change / Limitation on deduction**

...In adopting provisions of the bill, the committee reemphasizes that section 280A was enacted because of concerns about allowing deductions for items which have substantial personal component relating to home, which most taxpayers cannot deduct, and which frequently do not reflect the incurring of significantly increased cost as result of the Business activity, and that the provision should be interpreted to carry out its objectives"

The first thing, which is important here is: the differentiation that Committee makes between expenses-deductions which have in them "substantial personal component", which frequently do not significantly increase the cost of the business activity itself, and expenses for business activity, which clearly tells us that these expenses "which most taxpayers cannot deduct" are different from the Ordinary and Necessary Bus. Exp., the ones without which business simply cannot exist. We also know, and we spoke about this earlier that, Ordinary and Necessary Bus. Exp. do not have in them any "personal component", (which also can be characterized as component, related to ownership of personal item, in this case – home, and in assuring long time security of its equity); because they are just expenses necessary for income creating activity. The characterization of expenses that have in them "substantial personal component relating to home", tells us that, such expenses, while not entirely personal, because in exchange for them taxpayer does not receives something that he can touch as an object for personal use;

but that they are personal enough - to a degree, that, when taxpayer is not using his home for business, they are not deductible. There is only one category of expenses, which fits definition of having in itself such substantial personal component; and these are: Home Insurance, Home Depreciation, etc; which, as we know, only Hmrs. can have, because they are the payments for security and preservation of the Equity of the Home. And because such expenses do not directly participate in the income creating activity of business, most of the times they are small in comparisons with Business Expenses. Overall, this first quote from Legislative Committee Opinion already gives us a good guess what are these **Home Office Deductions**, for the **Use Of the Unit Itself**, - names that Committee uses in its next quote. And the next quote from the same Legislative Opinion-Amendment, which T. C. included in its Opinion, and R.'s Side quoted in its Brief, as undeniable proof that R. is right and Pr. is wrong, unfortunately, was understood erroneously by both. This particular quote, can be called, as it's fashionable now, the mother of all proofs in support of Pr.'s position, and it is this quote that was mentioned in Introduction to Issue No.1. It is presented bellow:

#### **"Explanation of Provision / Limitation on deduction**

**In general.** – The bill limits the amount of a home office deductions (other than expenses that are deductible without regard to business use, such as home mortgage interest) to the Taxpayer's gross income from the activity, reduced by all other deductible expenses attributable to the activity but not allocable to the use of the unit itself. Thus, home office deductions are not allowed to the extent that they create or increase a net loss from the business activity to which they relate."

What are the incredibly important features of this quote, that render its unquestionable support for Pr.'s Position?:

a). The first two and a half lines of this quote, evidence to us the inseparable bond in Sec.280A, between Home Office Deductions, and such expenses, as Home Mortgage Interest and similar, in the setting and meaning of Sec.280A. It tells us that, when and where home office deductions are present in situation of partial business usage of home under Sec.280A, the mortgage interest, and similar to it, are inescapably present too. The deduction of the last is not limited in any case, but deduction of the first can be, which presents to us additional confirmations that Home Office Deductions are, what we were contending all along in this petition – the deductions

that only homeowners can have, considering that, term "Home", or "Dwelling Unit", under the purpose of Sec.280A and its amendment, means property – the owned home.

**b).** This Quote most sharply differentiate between Home Office Deductions, as such, and deductions of Ordinary and Necessary Bus. Exp., which Committee identifies as "all other deductible expenses attributable to the activity", to which Pr.'s BRPs. most unquestionably belong; and this quote underscores that, such Business Expenses cannot be even allocated to Use Of the Unit Itself, which means that any attempt to try to allocate Ordinary and Necessary Bus. Exp. to Home Office Deductions is wrong and is against the tax law! (*Hence, they were not included in Tr. Reg. 1.280A and Sec.280A, as expenses falling under its limitation.*)

**c).** But even before that, this Quote establishes that, deductible business expenses - "attributable to the activity" itself – must be deducted first from the Gross Income from the business, without regard to possible Home Office Deductions, to which they cannot be allocated; and no tiniest inkling exists in this quote that would tell us that deduction of the Ordinary and Necessary Bus. Exp. can be limited, if part of the home is used for business, even in regard to businessmen-homeowners!

**d).** But the crown jewel of this Quote is its Last Sentence with its combination of the three most instructive words, such as "create or increase", which establishes, once and for all, three important things:

**First:** If the Excess of Gross Income from the business exists, after all pre Home Office Deductions were processed, and the amount of Home Office Deductions is larger than the remainder of the excess of gross income, - Hmr. is allowed to deduct only the part of home office deductions, up to the limit of zero profit; but not to deduct farther, which would mean to Create a Net Loss! And this is what means that, Home Office Deductions are not allowed to create a Net Loss from Business. As another quote, from the same Committee Opinion says the same, in slightly different words: "The committee believes that a home office deduction to which section 280A applies should not be used to reduce taxable income from the activity to less than zero." (*The last underscored expression in this quote should not be gone by lightly, because here - Committee instructs us again that, it is Home Office Deductions that is the Sec 280A target, and not the Ordinary and Necessary Business*

*(Expenses, which were already deducted to calculate the Excess of the Gross Income.)*

**Second:** If the Net Loss from Business already exists, Home Office Deductions are not allowed to increase it. Which means that Net Loss from Business, on account of Ordinary and Necessary Bus. Exp., - indeed is allowable to be deducted in business setting on the part of taxpayer's residence; as it is equally and similarly deductible in full to any legitimate business within the same business year in United States; exactly what IRC. Sec.162 and its Tr. Reg. establish. It is only the Home Office Deductions that are not allowed to be deducted in such year of the business, in case of Business Net Loss, because in such a way, these deductions will Increase the Net Loss, what they precisely are not allowed to do by Sec.280A and its amendment! And now, we know that, it is not Ordinary and Necessary Bus. Exp., but Home Office Deductions that "...are not allowed to the extent that they create or increase the net loss from the business activity to which they relate".

**Third:** And finally, after all, we can clearly see that there is no any difference in approach to deduction of Ordinary and Necessary Bus. Exp., of which Pr.'s BRPs. are a legitimate part, between Sec.162 and Legislative Committee of Congress amendment of Sec.280A. (*After all, how Net Loss from the Business can be increased by the Home Office Deductions, if it is not allowed to be deducted in the first place?!*), which is a final proof that, Sec.280A and its Paragraph 280A( c )(5) follows the Legislative Committee Opinion to the letter.

#### **Part D. - Additional Important Considerations:**

1. Many questions can be asked in regard to - why Sec.280A was written the way it was. Why it does not use term Homeowner, or Homeowners expenses? Why it does not use such terms as Home Office Deductions, Home Office Costs, or Use Of The Unite Itself, within Sec.280A, and gives their precise definitions; and why it uses instead only suggestive terms, such as "Certain Expenses", and "Expenses Allowable Under This Chapter"? Our suggestive answer is threefold. **In the first** – it was abundantly self-evident to everybody involved in the process of enactment and amendment of Sec.280A, what this section is all about. **In the second** – Legislature probably felt somewhat shy, to a degree, to advertise openly, by the different than suggestive terminology that, homeowners will get yet an additional deductions, such as Home Insurance, Home

Depreciation, and similar, which actually don't have anything to do with business per say. **And in the third** – Legislature probably relied on the two times usage of term "property" in definition of the Dwelling Unit, which we will discuss further; but before that, we have to note that, the actual way in which Sec.280A has been written, led to the situation that, many important for this section's proper usage – terms and rulings, ended to be scattered all over. Some – only in Tr. Reg. 1.280A-1,2, which makes this Regulations extremely and unavoidably important for proper application of Sec.280A; (*but R. R.'s Side in its Brief to Court of Appeals, and both lower Courts completely disregarded and ignored them*); and some can be found only in the text of the Sec.280A amendment; which, altogether, is the least helpful situation for the proper understanding and application of Sec.280A. And the T.C. Opinion clearly reflects this situation, with T.C. quoting text of Sec.280A Amendment, which sounds totally in contradiction, with what Court is trying to prove. (*See Part "E" of this Petition.*)

2. The definition of Dwelling Unit also deserves special attention, because, as we already mentioned, it uses the word "property" twice, which makes it suggestive that it describes dwelling units owned by taxpayers. We quote this definition below:

"In general – The term "dwelling unit" includes a house, apartment, condominium, mobile home, boat, or similar property, and all the structures or other property appurtenant to such dwelling unit."

During the audit, and in his Appeal Statement for <sup>the</sup> year 1997, Pr. contended that expression "or similar property" suggests possible additional types of properties, similar to ones that were already listed. R. objected to this, contending that the given list, lists none property units, and expression "or similar property" defines the properties similar to none property units listed earlier. Pr. objected to such contention on the basis that, this would limit the list of the properties to the already listed only, pointing also that expression: "or other property appurtenant to such dwelling unit"- is very suggestive that, all dwelling units listed in this definition are owned units, because it is impossible for the "other property" to be "appurtenant" to none property in the same unit. R. and T.C., however, remain convinced that "Dwelling Unit" definition describes both kind of Units: owned and rented, which was important argument for the T.C. in Court's Opinion; for R. in R.'s motions to the T.C., and in R.'s Side Brief to Court Of Appeals, with

all three contending that limitation of deductions by Sec.280A is applied to both kind of D.U., owned and rented. On account of such importance of this argument for the over named parties, and due to the fact that such argument apparently received affirmation in the Court of Appeals decision, Pr. would like to express his opinion that such argument is without legal merit; since, considering the fact that all taxpayers live in some kind of homes with physical description similar to D.U., definition of D.U. itself has no legal power to rule what deductions are limited and what are not, even, if only a part of the home is used for business; because limitation on deductions can be applied only to Expenses incurred in these Units, but not to the Units itself! This Pr.'s opinion, however, should not repudiate Pr.'s contention that, in design of Legislature, definition of the D.U. was intended to describe only owned D.U. And as an evidence, possibly supplying additional weight to such Pr.'s contention, it is worth to note solid R.'s Publication No.10, entitled "Rental Income and Expenses" (*Part of the larger Publication -17, entitled "General Information"*). This publication consist of ten pages of very small size text, arranged in three columns, and it uses the term D.U. all throughout its content, and only in the meaning of property owned by taxpayer. On the page 70, of this publication, in the left column, the definition of the D.U. is located, and we quote a major part of it.

**"Dwelling Unit.** The rules in this section apply to vacation homes and other dwelling units. A dwelling unit includes a house, apartment, condominium, mobile home, boat or similar property." The whole text of this publication and its multiple examples do not leave any doubt that, definition of D.U. was cast by Legislature for specific purpose – to describe D.U. owned by taxpayer.

3. Another, and probably even more important question, in addition to those we already asked, is: Why legislature has not placed the Ordinary and Necessary Bus. Exp. under the Sec.280A limitation rule, and we will offer possible answer for that.

a). Business activity always involves risk of failure, which can equally happen to a small proprietor and to a powerful corporation. This is why survival of business, toward possible success is of major importance for the proprietor, its potential customers, or, in some cases, even for the whole nation, or the whole humanity, if the business has a worthwhile goal, which may take sometimes years to achieve. This is why, deduction of the business loss to any legitimate business in America is not used as a mean for undeserved financial

punishment, but allowed by IRC. Sec. 162 and Tr. Reg. 1.162-1. And this is why, it would be discriminatory to deny deduction of Business Loss to a businessman, who is using one part of the home that he owns or rents from the other, - for a business, and the other part - for a living; because the nature of the business, as an activity, does not change with the place where it is conducted. Business, depending on a location, can only be larger or smaller, be more or less convenient for the proprietor, and give more or less capabilities for him. But it will always remain just the same – business; and such actions as R. enforces, is clearly beyond the purpose of Sec.280A, and can truly create paradoxical results.

b). To illustrate the last, let us consider a hypothetical, but quite possible situation, in which two businessmen rent spaces for their businesses. The first businessman, can financially afford to rent two apartments. A studio apartment for living, and one bedroom apartment exclusively for business. The second businessman can not afford to rent two apartments. So, he rents from the same landlord, in the same building, a single two bedroom apartment, which costs him substantially less than two apartments; and he assigns exactly the same space, as the first businessman, for business, and the rest of the apartment - for living. Let us imagine that, both businessmen did their best to succeed, but at the end of the tax year came with net loss for business; but the one, using the whole apartment for business, sustained even bigger loss than the other, which was using only the part. There is no question for the R. that, the first businessman, one that was using the whole apartment for business, can deduct his business loss fully; but the second businessman, which was using, even if equal size, part of the apartment - can not, according to R.'s position. But let us consider following: Both businessmen are renters. Both have completely equal, in legal sense, Rental Contracts. Both use the same physical entity, which is the same size part of the same building, and both use this part of the building exclusively for business. Why discriminate one, which created even more net profit, against the other? Why discriminate one in regard to the business survival against the other, and why use Sec.280A, as a mean for unfair and undeserved financial punishment? And why discriminate the second businessman against the other in regard to Equal Chance For Pursuit Of Happiness? Pr. has only one answer to all these questions. Pr. does not know of any existing Laws in This Country,

which would allow R. to treat these two businessmen differently in regard to the net business loss.

#### **Part E. - What Happened At The Tax Court And How Tax Court Arrived To Its Decision?**

1. Pr., in his Initial Trial Arguments, which T.C. agreed to accept in writing only, clearly explained to Court why Pr. claims his Rental Deductions under Sec.162, and not under Sec.280A, by the same reasons, presented by Pr. on previous pages, with exception only of Sec.280A's 1985 Amendment. Court, during very short open session, demonstrated initial understanding of Pr.'s choice of Sec.162; and while R., in response to Court question, stated that this case can be decided upon within fifteen minutes, Court announced that, it will not judge this case from the bench, but will issue its Opinion within three month.

2. In its Opinion, T.C. announced from the start that, it will formulate it completely beyond Burden of Proof, allowing itself to completely ignore P.'s Trial Arguments, and simultaneously shield R. from Legal Dialog with Pr., by declaring that, in such circumstance it is not necessary to decide whether R. should prove anything at all. By this act, Court neutralized both: Pr.'s Legal Arguments and Pr.'s ability to play equal part in judicial process, and made Pr. just a passive observer of whatever Court will say or do, which equaled, in Pr.'s opinion, complete denial to Pr. his Constitutional Right for Equal Access to The Due Process under the Law, since such Court's approach allowed Pr. only the act of filing his documents. In addition to this, rejection by the T.C. of all Pr.'s arguments, resulted in depriving Pr. from Equal Constitutional Protection under Tr. Reg. 1.280A-1.2, Tr. Reg. 1.162-1, and IRC. Sec.162, (*and farther down the line, from protection by the Text of Sec.280A Legislative Amendment*), all of which shielded Pr. from possible unjust taxation, and on which Tax Laws, exactly how they are written, Pr. based his case; and especially, because three of these Tax Laws were never considered in similar cases, and only one, Sec.162, was only casually mentioned. Naturally, Pr., in the position that Court put him, wasn't able do anything in this regard, because Court simply didn't speak with Pr., but only ordered him. Pr. has filed several Protest Motions to the Court, asking for oral hearing, and evaluation of his arguments on their legal merit, but all of them were flatly denied. All of this, lead to situation that, from the start

and to the end of Court proceedings, Pr. had only R. to deal with, and this one - was the Court itself!

3. To justify the total rejection of Pr.'s Burden of Proof, Court first disregarded U.S. Code section **7491**, not taking in account the facts that: **A).** Pr. presented credible evidence in support of his position, contained in precise formulations of several, related to his case, Tax Laws, which were never, in depth, or at all, considered in similar cases, as a challenge to Sec.280A supposed ruling authority over Ordinary and Necessary Bus. Exp. **B).** Pr. presented all tax returns backing records to the auditors, including detailed plans, and step by step detailed photographs of his business, beginning from the building's street view, to the views of Pr.'s business rooms from all angles; package of receipts, confirming that all business furnishing and equipment was purchased in advance of Pr. renting this flat, primarily, for business purposes, and photographs from Pr.'s art works; and no auditor ever complained that Pr.'s tax records were insufficient. **C).** Stipulation of Facts was signed by both sides and presented to Court in the timely manner; and this is why, Pr. have to stipulate that, Court's footnotes, in Court's Opinion, in regard to R. not challenging the Business Percentage of Pr.'s business space; and not paying attention to the slight increase of this percentage in 1998, - are out of place and not accurate; since Pr. presented to R.'s auditors two different plans of his business areas, each for each year, and 1998 plan was including Pr.'s Garage space on the ground floor, which Pr. used in 1998 exclusively for business, while parking his car on the street. It has to be noted also that, during the short opening session, Court specifically asked R., if he had, or has now, any objection to the Pr.'s Business percentage usage of the Pr.'s apartment, and R. answered - "no". And, at the same opening session Pr. specifically asked Court for the Oral Hearing to present his legal position; and both sides declared in their Trial Memorandums their intention to call witnesses, if such need will arise during the hearing. But Court did not allow the Hearing. The Rule **142 (a)(1)** was also erroneously interpreted by the Court, because Pr. has assumed all possible responsibility for the Burden of Proof for his legal position, but it is Court that killed it from the start in all respects. And it was R., who refused to enter in legal dialog with Pr. during pre-trial appeals review, in which R., in writing, declined to answer not only to any specific tax laws based arguments, but to the Constitutional arguments also, which was R.'s

special obligation to answer by the Rule CFR 601.106(b) and IRM 8.1.2.2.5. The same attitude R.'s counsel held in advance of Trial.

4. To justify its arguments rejection actions, and the other, Court cited two Supreme Court cases:

INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992) and Welch v. Helvering, Commissioner of IRS, 290 U.S. 111, 115 (1933). Both of these cases, however, do not extend to Court any support for the rejection of Pr.'s Burden of Proof. Both cases are not related to Sec.280A at all, and neither they related to the challenge by Pr. that it is Sec.162, and not Sec.280A, which is authorized to rule over Bus. Exp. deductions. Both cases are related to Sec.162, but on completely different matter. In both cases, Supreme Court has decided that corporate Capital Expenditures, destined, in INDOPCO case, - to improve its corporate structure for the long time effect, and in Welch case, - to improve its business image in corporate world, - do not necessarily belong to the Ordinary and Necessary Bus. Exp. In INDOPCO case, Court in fact, lists several conditions for the Bus. Exp. to qualify for deductions under Sec.162, as "ordinary and necessary". These are: **First** – "an item must be paid or incurred during the taxable year"; **Second** – "be for carrying on any trade or business"; **Third** – "be an expense"; **Fourth** – "be a necessary expense"; **Fifth** – "be an ordinary expense" for which qualification the expense must relate to transaction "of common or frequent occurrence in the type of business involved". (*quotes*) There is hardly an objection can be raised against that, Pr.'s business percentage of his month to month rent and utilities payments, fully conform to all these Supreme Court's conditions.

5. To bring Court's Opinion to final conclusion, which would fully support R.'s attempt for taxing P.'s Bus. Exp., Court has chosen a complex road, trying first – to accept Pr.'s right to claim his Bus. Rental Deductions under Sec.162, and then - to find the way around it through IRC., and prove that Sec.162 is legally subjugated to Sec.280A; and thus, can be subject to Sec.280A restrictions. This choice of the Court, however, in opinion of Pr., was destined for the failure from the start; because if Pr.'s BRPs. are not included in Sec.280A as an Item over which Sec.280A rules on its own, (the absence of legal basis to rule over Strictly Business Expenses and impose taxes on them, as we showed Earlier), - how Court may hope to find the specific rule outside this Section, which would empower

Sec.280A to do, what it is not suppose to do in the first place, by the design of Legislature.

6. The text of Tax Court's Opinion testifies that Court tried to prove this maneuver worthwhile, not only to the Pr. and R. or anyone else, but although to itself, - with help of slight, but important omissions from Sec.162, complete ignorance toward existence of Tr. Reg. 1.280A-1,2 and 1.162-1, and misinterpretation of Sec.280A's Legislative Amendment, by reformulation of its most important rulings, so that they will fit Court's position on application of Sec.280A.

7. It is worth to note that, (*on the Page 5 of Court's Opinion, A-1 in Appendix*) the very title of Point A: "Deduction for Business Use of Home", under which Court quotes second part, subparagraph (3) of major ruling of Sec.162, - is capable immediately to throw reader from the track of precise legal meaning of the whole of 162(a)(3) - toward the needed for Court direction, and create an impression that, Pr.'s BRPs. do not belong to the Ordinary and Necessary Bus. Exp., - fully deductible within the year of the business; but that they are part of the expenses for The Business Use of Home. And, while it is true that, Pr. attached to his Schedule C, Form 8829, is has to be noted that, there are no other form, which is available for taxpayers, like Pr., to declare the business usage percentage, and to calculate their Rent and Utility payments. But, while filling out this form, Pr. typed right under its title that, the home is not owned but rented.

8. On the Page 6 of its Opinion, (*A-1 in Appendix*) Court undertakes its attempt to prove dominance of Sec.280A over Sec.162.; and we will respond to it here in the same way we responded to T.C. in Pr.'s Motion For Reconsideration:

a). When T.C. accepted Pr.'s right to deduct his BRPs. under Sec.162, Court unwillingly and in-admittedly, but still evidentially, accepted all previous Pr.'s Legal Arguments in regard to Sec.280A, similar to given in this petition, - which Court refused to consider. It is thanks to These Arguments that Court realized that, Pr.'s BRPs. are not specified in Sec.280A, as an Item over which Sec.280A rules, and realized that Sec.280A is powerless on its own to rule over the Ordinary and Necessary Bus. Exp.; and these expenses are truly and specifically defined and ruled over by Sec.162.

b). After briefly accepting Pr.'s right to deduct his BRPs. under Sec.162, - Court, in Pr.'s opinion, was just one step away from Proper and Just Decision, which could be formulated by Court's

reliance on Tr. Reg. 1.162-1, which allows deduction of Ordinary Bus. Exp. in full in the current business year, even if such expenses surpass Gross Income of business; but Court have chosen a path, which erroneously lead Court beyond Sec.1.162-1, and this is why the means, that Court used on the way to intended proof, don't have adequate to the Court's purpose legal standing in the IRC.

c). (*In the second from the top paragraph on Page 6 of Court Opinion, A-1*). Court makes accent on the word "Structurally", while relating to us the Navigational addresses within the IRC. to Sec.162 and Sec.280A. Through this listing of certain subpart of the part, which, in its own turn, is the subpart of something bigger, and so on, Court intends to create impression that, because Sec.162 is located in Part VI (*Itemized Deductions For Individuals And Corporations*), along with Sec.161; and Sec.161 contains reference to Part IX where Sec.261 is located along with S.280A that, Court will be able to establish, with help of Sec.261, that Sec.280A has legal dominance over Sec.162. In the end of this paragraph (*page 6, A-1*), Court is actually suggesting that, Sec.162 was placed in IRC. specifically to be subjugated to Sec.280A?! To support such conclusion, Court mentioned New Colonial Ice Co. v. Halvering, 292 U.S. 435, 440 (1934), which, in our opinion, can not yield to Court anything, because it is this Pr., who came precisely within express provisions of the statute in the current case, and it is T.C., which has completely ignored all express provisions in all statutes, intimately related to Pr.'s deductions. And in addition to this, Court's effort, in our opinion, can not possibly succeed by the following reasons:

**First:** The Addresses to individual Sections in IRC. that Court supplies, even while indicating the location of individual section within certain part, help us mostly to quicker locate the needed section, but do not contain in themselves any specific Legal Means or Specific Instructions, establishing interaction between variety of different, and often unique, IRC. sections, which differ by the purpose, and specific expenses they rule upon. Such addresses, in Pr. opinion, can be called Navigational Addresses, similar to ones we use in Microsoft Windows Explorer, were folders and subfolder are grouped together just for convenience to locate them quicker.

**Second:** There are over 30 (thirty) IRC. Sections located in Part VI, where Sec.162 is located, and the same amount of Sections located in Part IX, where Sec.280A is located; and each one of these Sections is devoted to regulation of deductions of completely

different and often unique variety of expenses; and each Section contains its specific rules. It is virtually impossible to formulate the Universal Rule, which will be able to encompass all this variety and complicity, especially in such short references as Sec.161 and Sec.261, on which Court tries to rely to prove its point.

**Third:** To overcome such logistic impossibility of formulating any kind of Universal Rule, specifically pointing to possible interactions between all principally different Sections, IRC. already uses the best and the most direct way to fulfill this task, which is called Cross-References between Sections, - located, if needed, in each individual Section. And in this regard it has to be repeated what Pr. related to R. and to T.C. on multiple occasions, and what was equally included in Pr.'s Brief and Contra Brief to Court of Appeals. There is only one Cross-Reference in Sec.280A toward Sec.162, but absolutely not in regard to Pr.'s Business Deductions; and while Sec.162 contains many Cross-References, none of them are related to Sec.280A, which is an extremely important evidence of the absence of any interaction between Sec.162 and Sec.280A in regard to Pr.'s BRPs. This extremely important legal fact was completely and equally ignored by the R., Tax Court, and Court of Appeals.

**Fourth:** While Sections 161 and 261 certainly cannot pretend to serve as universal rules for variety of nearly 70 (seventy) different IRC. Sections included in parts VI and IX, let us objectively examine what they contain in themselves in reality. **Sec.161 states:** (*we quote*) "In computing taxable income under section 63, there shall be allowed as deductions the items specified in this part (i.e., part VI), subject to the exceptions provided in part IX (Sec. 261 and following, relating to items not deductible)." Now, while this Section tells us something, it is not telling us anything specific, not even counting that Ordinary and Necessary Bus. Exp. are a deductible item, because they are the essence of the business process, without which Business is not possible; and Sec.162 and Tr. Reg. 1.162-1 have no buts or ifs in this regard. And **Sec.261 States:** (*we quote*) "In computing taxable income no deductions shall in any case be allowed in respect of the items specified in this part (i.e., part IX)."

Considering already established, and by T.C. itself recognized fact that, Pr.'s BRPs. are not specified in Sec.280A, located in Part IX, they are not specified in Part IX itself. And because they are not "items not deductible" of Sec.161, and definitely not specified in Part IX under Sec.261, both of these Sections have nothing to do

with them whatsoever! But with this established, it is worth to say a few words about Sec.261, and what it tells us. It tells us that, after this section, end comes to any deductions. "No deductions shall in any case be allowed." This is the end of it. No more. Zero. Zilch. Taxpayers, Tax Prepares, Tax Examiners, don't even look father. There is no light in the end of the tunnel after Sec.261. All is hopeless. But is it true? No, it isn't. There are allowed deductions in Sec.280A already, as well as in other sections in Part IX. Which, immediately proves that, Sec.261 is not universally applicable to all and any deductions in the Part IX , while it may be applicable to some of them - totally, and to some - in limited way, in some Sections. But, if Sec.261 is to be applied literally, it easily can become an instrument of abuse, because one can use it in any way one wants. After telling all of this to the T.C., Pr. suggested to T.C. only one plausible characterization of Sec.161 and 261: Sec.161 and 261 are not specific or universal rulings. **They create only General Awareness** that, in some circumstances, certain deductions can be allowed in full, in some - only partially, and in some – not allowed at all. The specific rules in this regard, are contained in Specific IRC. Sections, Cross-References between them, placed in individual Sections, and Tr. Reg. enacted as their Legal Extensions.

9. Pr. also related to the T.C. that, when U.S. Treasury enacts the specific Regulation as Legal Extension of Specific Section, it does it with explicit permission and authorization of U.S. Congress, and with complete and exhaustive knowledge of Internal Revenue Code. Thus, it is permissible to say that, Specific IRC Section, along with its Treasury Regulations, - constitute the Final Will of U.S. Congress toward the items over which this Specific Section rules.

10. Thus, Pr. concluded: Tax Court has not succeeded to prove that Sec.280A possesses legal dominance over Sec.162, and can limit Deduction of Ordinary and Necessary Bus. Exp. of Pr.

11. It has to be noted also that, after T.C. seemingly convinced itself that, it succeeded in proving legal dominance of Sec.280A over Sec.162, Court, which was first to open the door to Legislative (1985) Amendment of Sec.280A, interpreted this Amendment in convenient to Court way, without any attention to it sharp differentiation between two kind of Expenses, such as Home Office Deduction and Expenses as result of Business Activity, **which Legislative Opinion does not even allow to allocate to the Home Office Deductions!** (*In the middle of the Page 7 of Court's Opinion,*

*A-1. Court says):* "In other words, no deduction for use of an apartment may be claimed if said deductions would give rise, or increase a net loss from the business to which the deduction relates". (*And what happened to "...create or increase...if we may ask"?*) The substitution of "**create or increase**", in Legislative Ruling of Sec.280A, by "**give rise or increase**", creates major distortion and profound misinterpretation in this important Ruling, which is at the very heart of this case; but Court does it anyway, even, if by **quoting** the same ruling (*at the top of Page 8 of its Opinion, A-1*), Court has no escape, but to use expression "**create and increase**", - in total contradiction with Court's interpretation of this ruling on the previous page. In the same Court's interpretation, Court again tries to use the expression "use of an apartment", as the mean - to extract Pr.'s BRPs. out of Sec.162, and to relocate them in the same category with Homeowners Expenses, which have nothing to do with Business; overstepping the fact that, Pr.'s BRPs are not even included in the same List with Expenses, given in Tr. Reg. 1.280A-1,2. And, all of a sudden, Pr.'s Business Rental deductions become, in T.C. words, "...no deductions maybe claimed". It is here that we can observe, how the Misconception, and Myth, we were talking about, is given birth, without regard to actual and precise Letter And Sound of the Law.

Pr.'s Motion for Reconsideration of Court's Opinion, which contained Pr.'s objections to T.C. reasoning, similar to presented in this part, and part "C", was flatly denied by the T.C. with all Pr.'s arguments brushed aside, as not deserving Court's attention, similarly to initial Pr.'s Burden of Proof, along with all Tax Laws, on which both of these were scrupulously based. T.C.'s Order of denial of Pr.'s Motion for Reconsideration (*see Appendix A-2*) is, in its own way, a remarkable, and special document. Its meaning is: we wouldn't talk to you now, because we refused to talk to you before.

**12.** It is true that, to the end of T.C. proceedings Pr. was ordered to submit Response to the R.'s Motion for Decision Entry, and allowed to submit Motion to Vacate or Revise the Decision, where Pr. again insisted on his equal rights of equal participation in Judicial Process, and reminded Court of his rights under the Tax Laws, which were totally ignored by the Court, all of it was left without any attention by the Court, because all of these Motions we allowed by the Court only as procedural formalities, and all of them were flatly denied. As a final moment of conclusion of the T.C. case, it is worth to note

that, Court's Decision was entered in exact text, suggested by the R., without additional legal commentaries. (*See Appendix A-3*)

**Part F. - What happened at the United States Court Of Appeals for The 9<sup>th</sup> Circuit? (Judges: Fernandez, Graber, and Gould)**

1. Pr. submitted his Appeals Brief to the Court Of Appeals repeating the same legal arguments, which were presented to Tax Court, and similarly included in this Petition, asking Court to reverse the Tax Court Decision within the process of Oral Hearing.

2. Respondent's Side submitted its Response, in complete agreement with Tax Court reasoning in entering its Decision for R., and Pr. submitted its Contra Brief even in more details, asking for reversal of T.C. Decision again and for Oral Hearing again.

3. In both of his briefs Pr. tried to bring Court's attentions to fact that Pr.'s legal arguments are precisely based on the Sec.162 and Tr. Reg. 1.162-1 and 1.280A-1,2, and on Legislative Opinion of the Congress in regard to proper application of Sec.280A; and that Legal Facts and rulings, contained in these Tax Laws and Regulations are not the Pr.'s inventions, but the Laws Themselves; and that these Tax Laws extend to Pr. Constitutional protection against possible improper application of Sec.280A, in limiting deduction of the Net Loss from his business, which is not the function of Sec.280A. Pr. also asked Court to consider the fact that, in no precedent cases, the laws, mentioned above in this paragraph, were brought to challenge power of Sec.280 over Ordinary and Necessary Bus. Exp; and that in this regard, this case is the precedent in itself, and thus deserves special attention and open hearing. But the Three Judges Panel totally ignored all the Tax Laws and Reg., listed in this paragraph, declaring Pr.'s legal contentions, precisely based on these laws – meritless, and based its decision on Sec.280A alone, and on a single precedent case, which will be discusses in part "G" of this petition; and entered its unpublished decision for the R. Pr.'s request for the Oral Hearing was denied. (*See Appendix A-4, and further A-5*)

4. Pr. submitted to Court of Appeals, Petition for Rehearing En Banc, emphasizing in all relative details that, R.'s Side completely disregarded important legal facts of Sec.162 and 280A, and totally ignored Tr. Reg. 1.162-1 and 1.280A-1,2, and didn't even included these two in the list of legal authorities; and also misinterpreted Legislative Opinion of the Congress, in regard to proper application of Sec.280A - but this Petition was denied on August 2, 2005.

**Part G. – Precedent Cases.** 1. Several precedent cases were

brought by R. to attention of the T.C., and many precedent cases were brought to attention of the Court Of Appeals by R.'s Side. Most of these cases were related to Homeowners, and only a few - to Businessmen-Renters like Pr. In some cases, quite a few in fact, Prs, belonging to both categories, were not even able to prove the fact that they indeed had a business activity in their homes, and some couldn't substantiate business expenses. In some of the cases, Sec.162 was casually mentioned, but not to necessary degree of its ruling weight, and no Pr. ever challenged Sec.280A, as one that has zero legal bases for limitation of deductions of Ordinary and Necessary Bus. Exp.; and no one ever brought to the Court attention that Sec.162 has no Cross-References with Sec.280A. From all the multiplicity of precedents, Court of Appeals selected only one – Horton v. Commissioner, on which T.C. also relied, and which was partially identical to this Pr. case, as Pr. herself was also an artist, and her business net loss was also on account of Business Rental Payments. This Pr. was also disallowed part of her business rental deductions; but the great difference between the precedent and this case was that, Ms. Horton never challenged the power of Sec.280A to rule over her business rental deductions, and she never relied in her deductions on Sec.162 and Tr. Reg. 1.162-1; and she never brought to Court's attention that, her BRPs. are not included in the List of Deductions, over which Sec.280A rules, and she never invoked 1985 Legislative Amendment, of Sec.280A. Instead, Ms. Horton claimed her deductions on some California State Law, which allowed such business deductions, as hers, in abandoned industrial building, where her business and living quarters where located, which law, as judge have decided, had no jurisdiction in cases of federal disputes. Decision was entered for R., but in Pr.'s opinion, T.C. in this case acted under the same misconception in regard to legal powers of Sec.280A, which this Pr. is trying to dispel in his case. In this regard, in Pr.'s opinion, all similar, or near similar, to Pr.'s case precedents, in which Sec.280A was applied to deny deduction of substantiated Net Business Loss, are no more, than sad chain of Judicial Accidents, with each next one based on the previous.

2. In regard of this part "G", and the whole of this current case, much more attention deserve two historic precedents that Legislative Committee of Congress reviewed as typical examples, as reason for Sec.280A's 1985 Amendment. In both cases Prs. are homeowners,

which is telling by itself. In the first T.C. case, Feldman v Commissioner, 84 T.C. 1 (1985), Pr. rented part of his home to his employer, as a place for Pr.'s office space, at the convenience of his employer. Pr. thus deducted his rental business expenses, for the business percentage of his property, adding to it deductions for insurance, utilities, city charges, pest control, repairs, and maid service. Pr. also deducted proportional part of home depreciation. This particular case has no analogy to this P.'s case, and the only reason we mentioned it, is to explain Committee's mentioning in the same brackets, in the beginning of its opinion – (e.g., rent, depreciation, and repairs)., were rental expenses are related to rental use of the dwelling unit.

In second case, Scott v. Commissioner, 84 T.C. 683 (1985) Committee apparently disagreed with decision of the T.C., which amounted to allowance for deductions for the business use of one's home, to create or increase the net loss from the business activity itself, which was one of the main reasons for Sec.280A to be amended, by adding to paragraph (c )(5) subparagraph (ii), containing possible limitation on the deductions of typical Hmrs.' home office costs, on which meaning we elaborated in details in Part "C" of this petition. One is able to conclude, from familiarizing oneself with these two cases, brought by Committee to our attention, that the reasons for changes in Sec.280A were: to straighten the regulation of deductions, in cases where taxpayer rents part of his dwelling unit to his employer, as his working space at convenience of his employer; and to establish limitations on deductions of the typical homeowners' expenses for the business use of home, in cases where such deductions can create or increase the net loss from the business activity itself. It is worth to note that, both of this cases, and especially the second one, where Committee demonstrates its concern, not with deduction of the business net loss in this case, but with allowance by the T.C. to deduct Expenses for the Business Use of Home, which were increasing the Net Loss from business, - fully support Pr.'s understanding of Legislative Amendment of Sec.280A.

### **CONCLUSION on Issue No.1**

After considering previous precedents, Pr. wants to bring Court's attention, once more, to the most important one, which is this case; because in all listed in this case past precedents, Courts always were able to enter decision for R. on the basis Sec.280A alone. It is only in this case that, T.C., however unwillingly, acknowledged that Pr.'s

BRPs. are specified and ruled upon directly - only in Sec.162. In this case, T.C. simply had no legal escape from this legal fact; and had to quote the ruling paragraph of Sec.162, (*while omitting the first part of it*), which states that all the Ordinary and Necessary Bus. Exp. are deductible in the current business year. But because omission doesn't eliminate the written rule of law, T.C. definitely struggled to find something, which does not exist in IRC., which would be - some specific ruling that Sec.280 has legal power over Sec.162; and, as we already proved, Sections 161 and 261 are not capable to yield such conclusion, because both of them lack any specific rulings, which can assert it; because both of these sections - are no more, than awareness remarks that, something could happen down the road, but as we already know, only in specific IRC. sections and under their specific rules, including specific cross-references with some other sections. The important thing, however, for this case is that, Sec. 161 and 261 were the last and the only arguments that T.C. relied upon, that it found what it was looking for in IRC., as a reason to enter its decision for R. But these last T.C.'s points of proof, **by their characteristic none-specificity**, lose their legal standing, **if compared with specific rulings and evidential facts of Sec.162, Tr. Reg. 1.280A-1,2, and 1.162-1; and, especially, with precise Instructions on the purpose and proper application of Sec.280A, given in Legislative Committee Opinion of Congress.** In addition, if R., T.C., R.'s Side in the Court of Appeals, and Court of Appeals itself, - wouldn't ignore Tr. Reg. 1.162-1, they would be able to find there subparagraph (b) Cross references; and (b)(2), with following: (quote) "For items not deductible, see sections 261-276, inclusive, and regulations thereunder." And as we can clearly see, "inclusive" and "thereunder" includes only specific set of sections and regulations within them, and the list of sections does not include Sec.280A.

And in the end, the simple fact of this case, is that on account of some ambiguity in formulation of Sec.280A, when some of its major rulings remained in the text of its Amendment, and some very needed definitions such as "Expenses for The Business Use of Home", "Home Office Costs" and "Use of The Unit Itself" also remained there, while comprehensible, but not precisely defined; and with List of specified Home Office Deductions found only in Tr. Reg. 1.280A-1,2, - the intermixing of two completely separate legal themes have happened. The deductibility of Ordinary and Necessary

Bus. Exp. within any legitimate business setting, which never has been challenged for decades, has been intermixed with conditioned and limited deductibility of Homeowners' Payments in the Equity of Their Homes, known, by the Congress given name, as Expenses for The Business Use of Home.

The legal theme of this Petition, is to untangle, with help and wise considerations of this Court, this strange intermix, and to set things straight for everybody's benefits, Petitioners, Respondent and Lower Courts. This is why, Petitioner hopes that the Writ of The Certiorari in this case should be granted, and Decision of the Lower Courts in this issue should be reversed.

### **Issue No. 2 Deduction of Capital Expenditures.**

As T.C. has admitted, Pr. has included Capital Expenditures in his deductions in Schedule C, as separate deduction category under The Title - Computer Hardware and Software, which clearly falls under the Capital Expenditures definitions; and which inclusion, in Pr.'s opinion, does constitute a Desire, which is the same as Election, which means only the expression of choice to claim such deduction, which Pr. certainly did. Also, when Congress allowed deductions of Capital Expenditures in full in the same year of the Business, within the allowable limits, - these deductions became an Important Business Entitlement, to help survival of the business; which, probably, should not be easily denied under the rigid deadlines, without sending to Pr. notification from R. that, Pr. needs to fill out and supply an additional form, for his Capital Expenditures to be deducted; or to supply amended Tax Return with inclusion of such form. R., probably, can be entitled, in such case, for a certain fee for the delayed Tax Return. But, while T.C. indicates that Pr. was entitled to supply amended tax return; Court doesn't takes in account that, Pr. never received from R. any notification that something is amiss in his Tax return. And because such notification was never sent to Pr., for Pr. to be alerted that he must send an amended return, of fill our and sent to R. special form, which could be attached to R.'s notification; Pr. only contends that, these deductions could be allowed to Pr. by the R.'s Auditor, which checked Pr.'s Capital Expenditures purchase invoices, each one bearing Pr.'s name, and made accurate copies of each one of them, and with which help necessary form could be filled out on the spot.  
Pr. asks Court, to take this Pr.'s reasoning under the Writ of Certiorari consideration.

Supreme Court, U.S.  
FILED

05-799 DEC 12 2005

No.  
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In The

**Supreme Court of the United States**

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Michael H. Visin  
Natalie Marselly      *Petitioners*

v.

Commissioner of Internal Revenue Service  
*Respondent*

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On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The 9<sup>th</sup> Circuit

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**APPENDIX**

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T.C. Memo. 2003 - 246

**UNITED STATES TAX COURT**

**Michael H. Visin and Natalie Marselly, Petitioners V.  
Commissioner of Internal Revenue , Respondent**

**Docket No. 10149-02      Filed August 18, 2003**

**Michael H Visin, pro se**

**Frank Panza, for respondent**

**MEMORANDUM FINDINGS OF FACT AND OPINION**

**Armen, Special Trial Judge:** Respondent determined Deficiencies in petitioners' Federal income taxes for the taxable Years 1997 and 1998 in the amount of \$1,393 and \$1,365 Respectively.

**SERVED AUG 18 2003**

After a concession by petitioners,<sup>1</sup> the issues for decision by the Court are as follows:

- (1) Whether for each of the years in issue, petitioners' deduction for the business use of their apartment is subject to the limitation on deductions set forth in section 280A(c )(5).<sup>2</sup>
- (2) We hold that it is.
- (3) Whether for 1998, petitioners are entitled to expense, rather than depreciate, the cost of computer equipment and software. We hold that they are not.

An adjustment to petitioner' self-employed health insurance deduction under section 162(1) is a mechanical matter, the resolution of which is dependent on our disposition of the disputed issues. See sec. 162(1)(2) (A).

#### FINDING OF FACTS

Some of the facts have been stipulated, and they are so found. Petitioners resided in San Francisco, California, at the time that the petition was filed with the Court.

During 1997 and 1998, the taxable years in issue, petitioner Michael H. Visin was self-employed as n interior decorator and artist, and petitioner Natalie Marselly was employed as social worker.

Throughout the years in issue, petitioners resided in the same apartment, which they rented. A portion of petitioners' apart+ment was used by petitioner Michael H. Visin for business purposes. In 1998, petitioner Michael H. Visin spent \$3,450 for computer equipment and software for use in his business. The computer equipment and software were placed in service upon purchase.

Petitioners filed Form 1040, U.S. Individual Income Tax Return, for each of the year in issue. Petitioners attached to each of those returns a Schedule C, Profit or Loss From Business, for petitioner Michael H. Visin sole proprietorship. Among the deductions claimed

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<sup>1</sup> At trial, petitioner did not contest, and are therefore deemed to have conceded, an adjustment in the amount of \$703 to cost of goods sold for 1997.

<sup>2</sup> Unless otherwise indicated, all section references are the Internal Revenue Code as in effect for 1997 and 1998, the taxable years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

on each Schedule C was a deduction for petitioner Michael H. Visin's use of petitioners' apartment for business purposes. In support of this deduction, petitioners attached to each of their returns a Form, 8829, Expenses for Business Use of Your Home. Petitioners' Schedule C for 1997 included the following entries:

Gross income	\$5,399.00
Less: expenses (excluding rent)	-4,392.40
	-----
	1,006.60
Less: rent	-10,305.27
	-----
Net loss	( 9,298.67)

Petitioners' Form 8829 for 1997 included the following entries:

Area used regularly and exclusively for business	700
Total area of home	1000

Business use percentage 70 Presumably, square feet

Petitioners used the foregoing percentage in claiming the Schedule C rent deduction of \$10,305.25

Petitioners' Schedule C for 1998 included the following entries:

Gross income	\$6,243.70
Less expenses (excluding rent)	- 4,243.63
	-----
	1,999.07
Less rent	-10,642.58
	-----
Net loss	( 8,643.51)

Petitioner's Form 8829 for 1998 included the following entries:

Area used regularly and exclusively for business	850
Total area of home	1150

Business use percentage 74 Presumably, square feet

Petitioners used the foregoing percentage in claiming the Schedule C Rent deduction of \$10,642.58

In reporting gross income from his sole proprietorship for 1998, Petitioner Michael H. Visin reduced gross receipts by cost of good

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<sup>3</sup> The record does not disclose the reason for the discrepancies between petitioners' Form 8829 for 1997 and Form 8829 for 1998 regarding "Area used \*\*\* for business" and "Total area of home"

sold. In part III of his schedule V for 1998, petitioner Michael H. Visin claimed cost of goods as follows:

Materials and supplies	\$2,847.30
Other costs: computer equipment and software	+3,450.00
Cost of goods sold	6,297.30

Petitioners did not attach to their 1998 income tax return a Form 4562, Depreciation and Amortization. Part I of that form is entitled "Election To expense Certain Tangible Property (Section 179)", and it is the form that respondent designed for taxpayers who wish to expense, rather than depreciate, qualifying property.

In the notice of deficiency, respondent disallowed a portion of the deductions claimed by petitioners in 1997 and 1998 for the business use of their apartment. Respondent based the disallowance solely on the limitation on limitation of deduction set forth in section 280A (c )(5). Respondent did not adjust either the gross amount claimed by petitioners for the rental of their apartment or the business use percentage on their form 8829.

Also in notice of deficiency, respondent treated the \$3,450 spent by petitioner Michael H. Visin for computer equipment and software for his business as a capital expenditure and allowed depreciation thereon.

Petitioner do not contest respondent's computation of limitation on deductions under section 280A (c )(5). Rather, petitioners contend that section 280A does not apply to renters or business property and that, therefore, the limitation on deduction under section 280A(c )(5) does not apply to their case. Rather, Petitioners contend that section 162(a)(3) authorizes deductions in issue.

Petitioners also contend that they are entitled to expense, pursuant to section 179, the \$3,450 spent by petitioner Michael H. Visin for computer equipment and software for use in his business.

## OPINION

We decide the issue in this case without regard to the burden of proof. Accordingly, there is no reason to decide whether section 7491(a) serves to shift the burden of proof from petitioner to respondent. See generally Rule 142(a); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992); Welch v. Helvering, 290 U.S. 111, 115 (1933).

A. Deduction for Business Use of Home  
Section 162 (a)(3) allows a deduction for:

rentals or other payments required to be made as a condition to the continued use or possession, for purposes of trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

Structurally, section 162 is included in part VI (Itemized Deductions For Individuals And Corporations) of subchapter B (Computation of Taxable Income) of chapter 1 (Normal Taxes and Surtaxes) of subtitle A (Income Taxes) of title 26 (Internal revenue Code) of the United States Code. The relevance of the placement of section 162 within the Internal revenue Code will become apparent momentarily.

Also included within part VI is section 161. That section provides as follows:

In computing taxable income under section 63, there shall be allowed as deductions the items specified in this part [i.e., part VI], subject to the exceptions provided in part IX (section 261 and following, related to items not deductible).

[Emphasis added]

Section 261, which is entitled "General Rule For Disallowance Of deductions", provides that "In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part [i.e., part IX]." One of the sections included in part IX is section 280A.

At this point it should be apparent that section 162 is subject to the exceptions and constraints of section 280A. See New Colonial Ice Co. v. Halvering, 292 U.S. 435, 440 (1934) (often cited for the proposition that deductions are a matter of legislative grace and hence a taxpayer claiming a deduction must come within the express provisions of the statute).

As relevant herein, section 280A(a) provides as a general rule that no deduction otherwise allowable to an individual "shall be allowed with respect to the use of the dwelling unit which is used by the taxpayer during the taxable year as a residence" The term "dwelling unit" is defined by 280A(f)(1)(A) to specifically include an apartment. The statute did not distinguish between a condominium apartment and a rental apartment. In other words, whether owned or rented, an apartment is a dwelling unit within intendment of the statute. See Horton v. Commissioner, T.C. Memo. 1997-572 (involving an artist who rented premises in a commercially zoned area, which premises were found by the Court to be a dwelling unit

Within the scope of the section 280A).

The seemingly prohibitory rule of section 280(a) is ameliorated by section 280A(c ), which provides exceptions for certain business uses. As relevant herein, section 280A(c )(1) provides that general rule of section 280A(a) is not applicable to any items to the extent it:

Is allocable to a portion of the dwelling unit which is exclusively used on a regular basis --

- (A) as the principal place of business for any trade or business of the taxpayer, [or]
- (B) as a place of business which is used by patient, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business\* \* \*.

The liberalizing effect of section 280A(c ) is not without its limitations, however. In particular, as relevant herein, section 280A(c )(5) limits taxpayer' deductions for the business use of the apartment to the amount by which the gross income generated from the business activity conducted in the apartment exceeds the deductions for expenses attributable to such activity that are not allocable to the business use of the apartment itself. See Martin v. Commissioner, T.C. Memo. 1996-503, affd. per curiam without published opinion 155 F. 3d 559 (4<sup>th</sup> Cir. 1998). In other words, no deduction for use of an apartment may be claimed if said deduction would give rise to, or increase, a net loss from the business to which the deduction relates. Id.

The foregoing exegesis of section 280A(c )(5) is confirmed by the legislative history of the most recent relevant amendment to that section. Thus:

Reason for Change

Limitation on deduction

\* \* \* \* \*

The committee believes that a home office deductions to which section 280A applies should not be used to reduce taxable income from the activity to less than zero. In adopting the provision of the bill, the committee reemphasizes that section was enacted because of concerns about allowing deductions for items which have a substantial personal component relating to the home, which most taxpayer cannot deduct, and which frequently do not reflect the incurring of significantly increased cost as a result of the business activity, and that provision should be interpreted to carry out its objectives.

\* \* \* \* \*

Explanation of Provision

\* \* \* \* \*

Limitation on deductions

In general. – The bills limits the amount of home office deduction (other than expenses that are deductible without regard to business use, such as home mortgage interest) to the taxpayer gross income from the activity, reduced by all other deductible expenses attributable to the activity but not allocated to the use of the unit itself. Thus, home office deductions are not allowed to the extent that they create or increase a net loss from business from the business activity to which they relate. [H. Rept. 99-426, at 133-135 (1985) 1986-3 C.B. (Vol. 2) 133-135].

Finally, for petitioners' benefit, we observe that to extent deductions are disallowed under section 280A(c )(5), they may be carried forward to the succeeding taxable year. See sec.280A(c )(5), flush language.

In the view of foregoing, we hold that petitioners' deductions for the business use of their apartment are subject to the limitation set forth in section 280A(c )(5). Accordingly, we sustain respondent's determination in this regard.

B. Election To Expense Certain Costs Under Section 179

Section 179(a) permits to taxpayer to:

Elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service.

In respondent's view, the computer equipment and software that petitioner Michael H. Visin purchased and placed in service in 1998 May not be expenses under section 179, because petitioners failed to make an election on their return consistent with section 179(c ) and the regulations thereunder.

Section 179(c )(1) provides that an election under section 179 shall:

- (A) specify the items of section 179 property to which the election applies, and the portion of the cost of each of such items which is to be taken into account under subsection (a), and
- (B) be made on the taxpayer's return of the tax imposed by this chapter for the taxable year.

Section 179(c )(1) goes on to provide that the election to expense "shall be made in such manner as the secretary may by regulation prescribe."

Regulations regarding the time and manner of making an election under section 179 have been prescribed and may be found in section 1.179-5, Income Tax Regs. Specifically, section 1.179-5(a), Income Tax Regs., requires a separate election for each taxable year and, as relevant herein, that such election be made on the taxpayer's first income tax return for taxable year to which the election applies. The regulation goes on to track the statutory requirements of section 179(c )(1)(A) and (B). Finally the regulation requires that the taxpayer maintain certain records regarding each piece of section 179 property.

The Commissioner has published Form 4562, Part I of which is entitled "Election To expense Certain Tangible Property (Section 179)", and, as its title suggests, is intended for taxpayer's use in making the election to expense section 179 property.

Petitioners did not attach to their 1998 income tax return a Form 4562, nor did they unequivocally elect on their return to expense the cost of the computer equipment and software under section 179. On the other hand, petitioners did include the cost of that property as a component of cost of goods sold. However, we are not inclined to regard the inclusion of the property in the cost of goods sold as the equivalent of an election under section 179. See Patton v. Commissioner, 116 T.C. 206 (2001); McGrath v. Commissioner, T.C. Memo. 2002-231; Starr v. Commissioner, T.C. Memo. 1995-190 ("Entitlement to the benefits of section 179 is not automatic. It requires affirmative election be attached to the original return or to a timely filed amended return."), affd. without published opinion 99 F. 3d. 1146 (9<sup>th</sup> Cir. 1995). In any event, we observe that the matter is without any tax effect in 1998 under the fact of the present case. In other words, to the extent that petitioners are denied an expensing deduction under section 179, they will be entitled to an increase, on a pro tanto basis, in the amount of their home office deduction under section 280A because the limitation imposed by section 280A(c )(5) will be that much less restrictive.

In the view of foregoing, we hold that petitioners are not entitled to expense the cost of the computer equipment and software. Respondent's determination capitalizing the cost of such property and allowing depreciation thereon is sustained.

**B. Conclusion**

To reflect the foregoing,

Decision will be entered  
Under Rule 155.

**UNITED STATES TAX COURT**  
WASHINGTON, DC 20217

MICHAEL H. VISIN AND  
NATALIE MARSELLY,  
Petitioners

v.

COMMISSIONER OF  
INTERNAL REVENUE,  
Respondent

Docket No. 10149-02

**O R D E R**

On October 14, 2003, petitioners filed a motion for reconsideration, leave for the filing of which was granted. See Rule 161, Tax Court Rules of Practices and Procedure, requiring any motion for reconsideration of an opinion to be filed within 30 days after a written opinion has been served, unless the Court shall otherwise permit. The Court's opinion in this case was filed and served on August 18, 2003, as T.C. Memo. 2003-246.

On October 24, 2003, respondent filed a Response to Petitioners' Motion for reconsideration. In his response, respondent object to the granting of petitioners' motion.

We recently had occasion to summarize our jurisprudence regarding reconsideration of opinion under Rule 161, Tax Court Rules of Practices and Procedure:

Reconsideration under the Rule 161 permits us to correct manifest errors of fact or law, or to allow newly discovered evidence to be introduced that could not have been introduced before the filing of an opinion, even if the moving party had exercised due diligence. The granting of a motion for reconsideration rests within discretion of the Court, and we shall not grant a motion for reconsideration unless the party seeking reconsideration shows unusual circumstance or substantial error. Reconsideration is not the appropriate forum for rehashing previously rejected arguments or tendering new legal theories to reach the end result desired by the moving party. [Estate of Hadler v. Commissioner, T.C. Memo.